Supreme Court, U.S.
FILED
06-212 AUG 9 - 2006
OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

MANUEL A. MIRANDA,

*Petitioner*,

v.

ALBERTO GONZALES, *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

## PETITION FOR WRIT OF CERTIORARI

Arthur D. McKey
HANSON & MOLLOY
1320 Nineteenth Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 833-9300

Adam Augustine Carter
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 261-2803

Paul J. Orfanedes
*Counsel of Record*
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, D.C. 20024
(202) 646-5172

*Counsel for Petitioner*

## QUESTIONS PRESENTED

1. Whether a person under threat of indictment may invoke the protections of the Speech or Debate Clause by bringing a declaratory judgment action rather than awaiting issuance of an indictment.

2. Whether a lower court, in considering requests for both declaratory and injunctive relief, has the duty to adjudicate the respective merits of both claims separately.

## LIST OF PARTIES

The following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

*Petitioner*:

1. Manuel A. Miranda

*Respondents*:

1. The Hon. John D. Ashcroft, in his official capacity as Attorney General of the United States (subsequently substituted for the Hon. Alberto Gonzales)

2. The Hon. Alberto Gonzales, in his official capacity as Attorney General of the United States

3. The Hon. W. Ralph Basham, in his official capacity as Director of the United States Secret Service

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF CITATIONS ..... vi

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 4

I. A WRIT SHOULD ISSUE BECAUSE THE D.C. CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, NAMELY, WHETHER THE PROTECTIONS OF THE SPEECH OR DEBATE CLAUSE MAY BE INVOKED IN A DECLARATORY JUDGMENT ACTION ..... 4

**Page**

II. A WRIT SHOULD ISSUE BECAUSE THE D.C. CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, NAMELY, THAT A REQUEST FOR DECLARATORY RELIEF SHALL BE CONSIDERED SEPARATELY FROM A REQUEST FOR INJUNCTIVE RELIEF ..... 8

CONCLUSION ..... 12

APPENDIX

Appendix A - February 16, 2006 Appellate Court Judgment ..... 1a

Appendix B - May 11, 2006 Appellate Court Order Denying Appellant's Petition for Rehearing *En Banc* ..... 5a

Appendix C- February 23, 2005 District Court Memorandum Opinion ..... 7a

**Page**

Appendix D - February 23, 2005
District Court Order ..... 15a

## TABLE OF CITATIONS

**Cases** **Page**

*Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321 (4th Cir. 1937). . . . . 4

*Age of Majority Education Corp. v. Preller*, 512 F.2d 1241 (4th Cir. 1975) . . . . . 11

*Davis v. Passman*, 442 U.S. 228 (1979) . . . . . 5

*Dombrowski v. Eastland*, 387 U.S. 82 (1967) . . . . . 6

*Eastland v. U.S. Servicemen's Fund*, 387 U.S. 82 (1967) . . . . . 6

*Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426 (1948) . . . . . 10

*Meredith v. Winter Haven*, 320 U.S. 228 (1943) . . . . . 10

*Polykoff v. Collins*, 816 F.2d 1326 (9th Cir. 1987) . . . . . 11

*Record Revolution No. 6 v. City of Parma*, 638 F.2d 916 (6th Cir. 1980) . . . . . 11

*Steffel v. Thompson*, 415 U.S. 452 (1974) . . . . . 8, 9, 11

*United States v. Brewster*, 408 U.S. 501 (1972) . . . . . 5, 6

*United States v. Gravel*, 408 U.S. 606 (1972) . . . . . 5, 6

**Page**

*United States v. Helstoski*, 442 U.S. 477 (1979) ..... 6

*United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980) ..... 6, 7

*United States v. Johnson*, 383 U.S. 169 (1966) ..... 5

*United States v. Rose*, 28 F.3d 181 (D.C. Cir. 1994) ..... 7

*United States v. Swindall*, 971 F.3d 1531 (11th Cir. 1992) ..... 6, 7

*Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984) ..... 5, 6

*Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) ..... 10

*Zwickler v. Koota*, 389 U.S. 241 (1967) ..... 8

**Constitutional Provisions, Statutes, and Rules**

U.S. Const., art. 1, § 6, cl. 1 ..... 2

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 2201 ..... 2

Federal Rule of Civil Procedure 57 ..... 2

## OPINIONS BELOW

The memorandum opinion and order of the U.S. District Court for the District of Columbia (hereinafter "District Court") are unpublished. *See* Appendices C and D at 7a and 15a, respectively. The judgment of the U.S. Court of Appeals for the District of Columbia Circuit (hereinafter "D.C. Circuit") is unpublished. *See* Appendix A at 1a. The order of the D.C. Circuit denying Petitioner's Petition for Rehearing *En Banc* is unpublished. *See* Appendix B at 5a.

## STATEMENT OF JURISDICTION

The District Court dismissed Petitioner's claims against Respondents on February 23, 2005. Petitioner appealed to the D.C. Circuit, which affirmed the District Court's dismissal in a *per curiam* judgment entered on February 16, 2006. Petitioner then filed a petition for rehearing *en banc*, which the D.C. Circuit denied on May 11, 2006.

This petition for writ of certiorari is timely, as it is being filed within ninety (90) days of the May 11, 2006 denial by the D.C. Circuit of Petitioner's petition for rehearing *en banc*.

If this petition for writ of certiorari is granted, the U.S. Supreme Court will have jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

U.S. Constitution, art. 1, § 6, cl. 1:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Declaratory Judgment Act, 28 U.S.C. § 2201.

Federal Rule of Civil Procedure 57.

## STATEMENT OF THE CASE

In 2003, Petitioner Manuel A. Miranda ("Miranda") served as the Judicial Affairs Counsel to the Office of the Senate Majority Leader. In November of that year, Miranda became embroiled in a controversy regarding the disclosure of certain memoranda prepared for Senators Edward M. Kennedy and Richard J. Durbin. The memoranda detailed strategies for blocking confirmation by the Senate Judiciary Committee of judicial nominations made by President George W. Bush. The memoranda were stored on the Judiciary Committee's "open" computer network, where they were readily available to any network user.

On November 13, 2003, excerpts of the memoranda appeared in a *Wall Street Journal* editorial. Miranda was

suspected of being responsible for the leak, and, in what Miranda alleges was an act of political retaliation and intimidation, the Senate Sergeant at Arms and Doorkeeper was directed to commence an investigation into whether any crime had been committed. Miranda was compelled to resign.

At the conclusion of the investigation, the Senate Sergeant at Arms and Doorkeeper issued a report accusing Miranda of accessing and disclosing the memoranda and violating several federal criminal statutes. In what Miranda alleges was yet another act of political retaliation and intimidation, the report was referred to the U.S. Department of Justice, which, in turn, referred the matter to the Acting U.S. Attorney for the Southern District of New York in April 2004. The report also was leaked to the media, then published widely. As a result, Miranda was effectively indicted in the "court of public opinion" and suffered substantial harm to his reputation and professional standing.

In September 2004, Miranda brought this action against the Attorney General of the United States and the Director of the United States Secret Service to try to clear his name, to protect his fellow staffers, and to promote the free flow of information. He seeks a judgment declaring that he did not violate certain laws of the United States, namely Sections 641, 1001(c), and 1030(a)(2)(B) of Title 18, and is entitled to the protections of the Speech or Debate clause. He also sought injunctive relief as well.

The District Court rejected Miranda's request for injunctive relief, finding that Miranda could challenge the constitutionality of any indictment under Rule 12(b) of the Federal Rules of Criminal Procedure if an indictment were

issued. Appendix C at 11a-14a. The District Court's written opinion did not address Miranda's request for declaratory relief separately, but nonetheless dismissed the entire lawsuit. *Id.* The D.C. Circuit affirmed, without oral argument, in a two-page *per curiam* judgment. Appendix A at 1a-4a.

While no indictment has been issued to date, Miranda has never been advised that he will not be indicted, and the limitations periods on the relevant criminal statutes have not expired. He remains in fear of criminal prosecution.

## REASONS FOR GRANTING THE WRIT

### I. A WRIT SHOULD ISSUE BECAUSE THE D.C. CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, NAMELY, WHETHER THE PROTECTIONS OF THE SPEECH OR DEBATE CLAUSE MAY BE INVOKED IN A DECLARATORY JUDGMENT ACTION.

The Declaratory Judgment Act was enacted "to afford a speedy and inexpensive method of adjudicating legal dispute without invoking the coercive remedies of old procedure," and "to settle legal relationships and remove uncertainty from legal relationships without awaiting a violation of the rights or a disturbance of the relationships." *Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937).

This Court has not, to Miranda's knowledge, squarely addressed the important issue of whether the protections of the Speech or Debate Clause can be enforced in an action for a declaratory judgment, or whether a person seeking to invoke the protections of the clause must wait until an indictment has been issued, and only then move to dismiss.

The Court has described the Speech or Debate Clause as "an important protection of the independence and integrity of the legislature" that "prevent[s] intimidation by the executive and accountability before a possible hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 178, 181 (1966); *see also United States v. Brewster*, 408 U.S. 501, 507 (1972) (noting that purpose of Clause is "to protect the integrity of the legislative process by insuring the independence of individual legislators.").[1]

In addition, the protections of the Speech or Debate Clause extend to legislative aides and assistants, such as Miranda, who are engaged in "legislative acts." *United States v. Gravel*, 408 U.S. 606, 616 (1972).

While the Court may not have addressed this precise question raised by Miranda, it has mandated that defenses based on the Speech or Debate Clause "should . . . ordinarily be given priority." *Davis v. Passman*, 442 U.S. 228, 236 n.11 (1979). Following this mandate, the D.C. Circuit concluded many years ago that the earliest possible resolution of Speech or Debate Clause immunity is critical. *See Walker v. Jones*,

---

[1] Petitioner respectfully submits that these protections are equally important regardless of whether the intimidation originates with the Executive Branch or the Legislative Branch.

733 F.2d 923, 935-36 (D.C. Cir. 1984) ("[t]hreshold resolution of Speech or Debate issues has been deemed critical . . .[c]ourts have a constitutional obligation to reach legislative immunity issues as early as possible") (MacKinnon, J., concurring in part, dissenting in part).

In addition, this Court's prior rulings have made clear that the purpose of Speech or Debate Clause immunity is to hold those engaged in legislative acts free not only from liability, "but also from the burden of defending themselves" from prosecution. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)); *see also Gravel*, 408 U.S. at 616.

Elaborating on these holdings, the U.S. Court of Appeals for the Eleventh Circuit has declared that it is not merely the fear of conviction that the Speech or Debate Clause protects, but also the "fear of indictment." *United States v. Swindall*, 971 F.2d 1531, 1547 (11th Cir. 1992). "Protection from criminal liability includes protection from prosecution, not merely from conviction." *Id.* (citing *United States v. Helstoski*, 442 U.S. 477, 488 (1979)); *see also Brewster*, 408 U.S. at 558-59 ("The threat of prosecution for supposed missteps that are difficult to define and fall close to the line of what ordinarily is considered permissible, even necessary, conduct scarcely ensures that legislative independence that is the root of the Speech or Debate Clause.") (White, J., dissenting).

Likewise, the U.S. Court of Appeals for the Third Circuit has noted that "the mere issuance of an indictment has a profound impact on the accused, whether he be in public life

or not." *United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980). The Court continued:

> Far from being hyperbolic, this evaluation of an indictment's effect is coldly realistic. It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Invocation of the constitutional protection at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning.

*Id.*; *see also Swindall*, 971 F.2d at 1547.

Similarly, the D.C. Circuit has determined that the immunity granted under the Speech or Debate Clause includes protection from "the cost and inconvenience of litigation." *United States v. Rose*, 28 F.3d 181, 185 (D.C. Cir. 1994).

By bringing an action for declaratory relief while he is under threat of indictment, but before an actual indictment has been issued, Miranda seeks to effectuate the very purposes of the Speech or Debate Clause; he seeks to invoke its protection to prevent a politically motivated, retaliatory criminal prosecution arising from his legislative acts and avoid the burdens such a prosecution inevitably would impose.

Confirmation that declaratory relief is available under these circumstances is important not only to Miranda, but also is important to assure Miranda's colleagues in Congress that a meaningful, early remedy is available to them if they are ever threatened with a politically motivated, retaliatory criminal prosecution. It also is important to protect the integrity of the legislative process. A writ of certiorari should be issued to enable the Court to address this important issue.

## II. A WRIT SHOULD ISSUE BECAUSE THE D.C. CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, NAMELY, THAT A REQUEST FOR DECLARATORY RELIEF SHALL BE CONSIDERED SEPARATELY FROM A REQUEST FOR INJUNCTIVE RELIEF.

In *Zwickler v. Koota*, 389 U.S. 241 (1967), this Court unambiguously declared that "a Federal District Court has the duty to decide the appropriateness and the merits of [a] declaratory request irrespective of its conclusion as to the propriety of the issuance of [an] injunction." *Id.* at 254.

The Court in *Zwickler* recognized that "different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other." *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974) (citing *Zwickler*, 389 U.S. at 252-55). These "different considerations" have their origins in the history of the Declaratory Judgment Act. *Id.* at 469. First, when the Declaratory Judgment Act was enacted in 1934, Congress

recognized that "a declaratory judgment will have a less intrusive effect on the administration of state criminal laws."[2] *Id.* Second, failing to consider the two requests separately effectively engrafts upon the Declaratory Judgment Act "a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied." *Id.* at 471. Such a requirement "would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate." *Id.* The Court's ruling in *Zwickler* has been reaffirmed on multiple occasions. *Id.* at 468-69.

In reviewing the District Court's ruling, however, the D.C. Circuit found no error in the failure to differentiate between Miranda's requests for injunctive and declaratory relief:

> The district court failed to separately set out its basis for denying declaratory relief; instead it relied on general principles addressed to the inappropriateness of granting equitable relief here. This is not reversible error. The district court did not abuse its discretion in denying declaratory relief in the absence of special circumstances and given its considerations of practicality and wise judicial administration.

Appendix A at 3a (internal citations and quotations omitted).

While Miranda does not dispute that the decision to grant declaratory relief sits squarely within a district court's

---

[2] While the criminal statutes at issue in this lawsuit are federal statutes, the concern about the intrusive effect of enjoining a prosecution is the same, if not stronger, in the context of a federal prosecution, in light of separation of powers concerns.

discretion (*see Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-89 (1995)), that discretion is not unlimited. *See Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426, 431-32 (1948); *Meredith v. Winter Haven*, 320 U.S. 228, 236-37 (1943). It also is separate and apart from a district court's duty to consider the appropriateness and the merits of a request for declaratory relief separately from any request for injunctive relief. The District Court did exactly the opposite of what this Court's decisions in *Zwickler and Steffel* require, and the D.C. Circuit affirmed.

Had Miranda's requests been considered separately, as *Zwickler* and *Steffel* require, the outcome may well have been different. Miranda's request for injunctive relief sought to enjoin any criminal prosecution based on the referral to the U.S. Attorney for the Southern District of New York. Miranda's request for declaratory judgment sought to clear his good name.[3] Without question, an injunction prohibiting

---

[3] In his Complaint, Miranda alleged that he has suffered "punishment by media and internet pillory . . . a cruel punishment for an unadjudicated crime," and attacks on his credibility and damage to his reputation and professional standing through an "unconstitutional and unauthorized legislative pronouncement of criminal guilt," among other harms. Complaint at paras. 20-21, 24. He argued likewise on appeal. *See, e.g.*, Brief of Appellant at 5 ("The controversy resulted in an improper Senate investigation exposing Miranda to nationwide pillory."), 10 ("Miranda, a respected lawyer, is presently unable to get stable work because it is known that he is being investigated for crimes allegedly committed while he worked in the Senate."), and 11 ("In Miranda's case, all questions of law could be settled by a declaratory judgment"); Reply Brief of Appellant at 12-13 ("Miranda, by sharp contrast, has now suffered under a cloud of an egregious Government-sponsored disclosure of the [Sergeant at Arms and Doorkeeper's Report] to the international media -- a "Report" which, with all the communications resources of the United States Senate,

prosecution of a person is very different from a declaration that a person has committed no criminal offense. The distinction is not unlike the distinction between being declared innocent and being found "not guilty." The lower courts did not comprehend this distinction because they failed to address Miranda's requests for declaratory and injunctive relief separately.

Moreover, concerns over the intrusiveness of enjoining an ongoing prosecution, or even a threatened prosecution, do not arise in the context of a request for declaratory relief, and it is at best uncertain whether the lower courts engrafted upon Miranda's request for a declaratory judgment "all of the traditional equitable prerequisites to the issuance of an injunction." *Steffel*, 415 U.S. at 471. A writ of certiorari should issue to address this obvious conflict with the Court's prior decisions.[4]

---

accused Miranda of violating several laws -- in effect indicting him.").

[4] The D.C. Circuit's ruling also may evidence a conflict among the courts of appeal in applying the Court's rulings on this question. Unlike in this case, in *Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987), the Ninth Circuit recognized the distinctions elaborated by this Court and held that an appellant's burden of establishing a right to injunctive relief in federal court is considerably greater than its burden of showing a right to declaratory relief. In *Record Revolution No. 6 v. City of Parma*, 638 F.2d 916 (6th Cir. 1980), the Sixth Circuit noted that the determination of injunctive versus declaratory relief was a "separate question," and took pains to consider each remedy separately, noting in its holding on injunctive relief that "a district court can generally protect the interest of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Id.* at 925 n.10 & 937. In *Age of Majority Education Corp. v. Preller*, 512 F.2d 1241, 1245 (4th Cir. 1975), the Fourth Circuit denied the availability of injunctive relief to a prospective criminal defendant, but reversed the lower court's ruling on

## CONCLUSION

For the foregoing compelling reasons, Petitioner respectfully requests that a writ of certiorari be issued.

Respectfully submitted,

Paul J. Orfanedes
*Counsel of Record*
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, D.C. 20024
(202) 646-5172

Arthur D. McKey
HANSON & MOLLOY
1320 Nineteenth Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 833-9300

Adam Augustine Carter
888 17th Street, N.W.
Suite 900
Washington, DC 20006-3307
(202) 261-2803

*Counsel for Petitioner*

August 9, 2006

---

a request for declaratory judgment, distinguishing between the two forms of relief and reiterating the separate availability of declaratory relief under *Steffel*.

**APPENDIX A - FEBRUARY 16, 2006**
**APPELLATE COURT JUDGMENT**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Manuel A. Miranda,
Appellant

v.

Alberto Gonzales, *et al.*
Appellees

---

No. 05-5066

---

Appeal from the United States District Court
for the District of Columbia

---

Before Henderson and Rogers, Circuit Judges,
Silberman, Senior Circuit Judge.

**JUDGMENT**

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs by counsel. For the reasons set forth below it is

**ORDERED** that the judgment from which this appeal has been taken be affirmed. Miranda appeals the district court's dismissal of his complaint to enjoin any criminal investigation related to his past conduct as a Senate aide and to immunize him from future prosecution. It is well-settled, however, that a court will not act to restrain a criminal prosecution if the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. *See Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987) (citing *Younger v. Harris*, 401 U.S. 37(1971)). The district court correctly held that, if indicted, Miranda can protect his rights under the First Amendment and Speech or Debate Clause pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure. F. R. Crim. P. 12(b) (2005) (upon indictment, defendant may raise by motion defense based on "defects in the institution of the prosecution"). *See also Deaver*, 822 F.2d at 70 ("existence of Rule 12(b)[(3)] suggests that appellant's constitutional challenge is not to be raised in a preindictment civil injunctive action").

Miranda argues that without injunctive relief his First Amendment right will be "chilled" and that the chilling constitutes a special circumstance that entitles him to injunctive relief under *Dombrowski v. Pfister*, 380 U.S. 479 (1965). As the district court pointed out, however, injunctive relief is not appropriate unless the party seeking it can demonstrate that his "First Amendment interests [are] either threatened or in fact being impaired at the time relief [is] sought." Joint Appendix 66 (quoting *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987)) (alteration in original). But Miranda himself alleges only that any infringement of his First Amendment right occurred while he was employed by the Senate. *See* Compl. ¶¶ 26-27, Joint Appendix 12-13

(alleging Senate Sergeant at Arms and Doorkeeper's investigation chilled his speech rights). *Compare Steffel v. Thompson*, 415 U.S. 452, 461 (1974).

Miranda's argument that he is entitled to declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, is likewise unavailing. While it is true, as Miranda states, that an adequate remedy at law does not preclude declaratory relief if such relief is otherwise appropriate, *see* Fed. R. Civ. P. 57, the decision whether to grant that relief is squarely within the district court's discretion. *See* 28 U.S.C. § 2201(a); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-89 (1995); *Hewitt v. Helms*, 482 U.S. 755, 762 (1987). The district court failed to separately set out its basis for denying declaratory relief; instead it relied on general principles addressed to the inappropriateness of granting equitable relief here. This is not reversible error. *See, e.g., Deaver*, 822 F.2nd at 71 (complaint sought both injunctive and declaratory relief; in dismissing complaint court did not explicitly state grounds for denying declaratory relief as it did for denying injunctive relief but stated "[p]rospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure"). The district court did not abuse its discretion in denying declaratory relief in the absence of special circumstances and given its "considerations of practicality and wise judicial administration." *See Wilton*, 515 U.S. at 288.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

*Per Curiam*

FOR THE COURT:

Mark. J. Langer, Clerk

## APPENDIX B - MAY 11, 2006 APPELLATE COURT ORDER DENYING APPELLANT'S PETITION FOR REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Manuel A. Miranda,
Appellant

v.

Alberto Gonzales, *et al.*
Appellees

---

No. 05-5066

---

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel*, Garland*, Brown, Griffith*, Circuit Judges, and Silberman, Senior Circuit Judge

**ORDER**

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

FOR THE COURT:
Mark. J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

* Circuit Judges Tatel, Garland, and Griffith did not participate in this matter.

**APPENDIX C - FEBRUARY 23, 2005**
**DISTRICT COURT MEMORANDUM**
**OPINION**

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

MANUEL A. MIRANDA,

Plaintiff,

v.

Civil Action No.
04-1578 (GK)

JOHN D. ASHCROFT,
Attorney General of the
United States, et al.,

Defendants.

**MEMORANDUM OPINION**

Plaintiff, Manuel A. Miranda, former Judicial Affairs Counsel to the Office of the Senate Majority Leader, brought suit against Defendants, John D. Ashcroft, then-Attorney General of the United States, and the Honorable W. Ralph Basham, Director of the United States Secret Service, seeking "a declaratory judgment that Plaintiff did not violate certain laws of the United States, namely Section [] 1030(a)(2)(B), Section 641, and Section 1001(c) of Title 18, that certain of these laws are unconstitutional, or unconstitutional as applied to the Plaintiff, or nonjusticiable, and that Plaintiff is immune from prosecution, or testimony under these laws pursuant to the Speech and Debate Clause." Compl. at ¶ 30.

This matter is now before the Court on Defendants' Cross-Motion to Dismiss the Complaint.[1] Upon consideration of the Cross-Motion, Opposition, Reply, and the entire record herein, and for the reasons stated below, Defendants' Cross-Motion is **granted.**

## I. BACKGROUND[2]

On November 14, 2003, the Wall Street Journal published an editorial containing excerpts from memoranda to Senators Edward Kennedy and Richard Durbin concerning strategies for blocking the confirmation by the Senate Judiciary Committee (the "Committee") of judicial nominations made by the President. According to Plaintiff, this editorial began the controversy known as "Memogate." Id. at ¶ 1.

In response to the editorial, Plaintiff alleges that the Committee Chairman, Senator Orrin Hatch, directed the Senate Sergeant at Arms and Doorkeeper (the "SAAD")[3] to "investigate and determine who had 'leaked' these supposedly 'confidential' documents to the press," Id. at ¶ 9,

---

[1] Defendants fashioned the instant Motion as a cross-motion to Plaintiff's motion for an expedited preliminary injunction, which the Court denied on November 15, 2004.

[2] For purposes of ruling on a motion to dismiss, the factual allegations of the complaint must be presumed true and liberally construed in favor of the plaintiff. Shear v. Nat'l Rifle Ass'n of Am., 606 F.2d 1251, 1253 (D.C. Cir. 1979). Therefore, the facts set forth herein are taken from Plaintiff's Complaint or from the undisputed facts presented in the parties' briefs.

[3] The SAAD is the Senate office responsible for the training and supervision of network administrators.

and "to investigate whether any crime had been committed." (the "SAAD Inquiry") Id. at ¶ 10.

According to Plaintiff, "[d]espite Senate rules intended to protect the confidentiality of Senate internal inquiries, within minutes of his meeting with the SAAD, [he] was surreptitiously identified to the media for public exposure." Id. at ¶ 11. He claims that "[t]his media pillory of [him] by the SAAD, senators and their paid staff continued with increasing intensity for the next four months, with frequent leaks of the SAAD Inquiry." Id.

In February 2004, Plaintiff claims that he was "forced to resign his position as Counsel to the Senate Majority Leader as a result of the improper influence by the SAAD and certain other interested persons." Id. at ¶ 12. Contemporaneously with his resignation, he filed a complaint with the Senate Ethics Committee disclosing that he had "discovered evidence of public corruption in the unpublished documents he had obtained from the Server." Id. at ¶ 13. Plaintiff claims that, because of the "embarrassing content" of this evidence, "senators used all their official power and their influence over the press to disguise their own wrongdoing, by systematically accusing [him] of escalating degrees of criminality." Id. at ¶ 17.

At the conclusion of the SAAD Inquiry, and, according to Plaintiff, "in violation of Senate rules and contrary to their own promises of confidentiality," the SAAD and members of

the Committee published the "Pickle Report,"[4] which "concluded with a government indictment of the Plaintiff in the nature of a Bill of Attainder [], alleging violations of federal crimes and other libels, and exposing [him] to further punishment by media and internet pillory." Id. at ¶¶ 19, 20. Plaintiff contends that Pickle then referred the Report and Bill of Attainder to the Department of Justice, which has, in turn, assigned the matter to the Acting United States Attorney for the Southern District of New York. Id. at ¶ 25.

Plaintiff maintains that "[t]he politically infused referral of this matter to the Attorney General, and the assignment of the case to the U.S. Attorney's Office for the Southern District of New York will, if an indictment results, cause immediate and irreparable harm to Plaintiff." Id. at ¶ 28.

To date, no indictment has been issued against Plaintiff.

On September 10, 2004, Plaintiff filed the instant action. On October 1, 2004, the Court denied Plaintiff's Motion for a Temporary Restraining Order on the grounds that (1) Plaintiff "cannot show a substantial likelihood of success on the merits," Miranda v. Ashcroft, et al., 04cv1578 (GK), October 1, 2004 Mem. Op. at 6; (2) Plaintiff "has failed to demonstrate with any particularity that he will suffer irreparable injury if the injunction is not granted," Id. at 7; and (3) "the strong judicial policy against intervening in ongoing criminal investigations or prosecutions reflects the fact that the public interest is best served by the fair and expeditious

---

[4] The Report was named after William Pickle, the Sergeant at Arms and Doorkeeper.

enforcement of the criminal laws." Id. (internal quotation omitted). On November 15, 2004, the Court denied Plaintiff's Motion for an Expedited Preliminary Injunction on similar grounds. See generally Miranda v. Ashcroft, et al., 04cv1578 (GK), November 15, 2004 Mem. Op..

## III. ANALYSIS

Defendants argue that Plaintiff's Complaint, "which seeks only equitable relief, should now be dismissed because [Plaintiff] has an adequate remedy at law for all of his claims -- specifically, he may challenge the constitutionality of any indictment brought against him through a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Criminal Procedure."[5] Def.s' Reply at 1. Defendants are correct.

It is a "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law[.]" Younger v. Harris, 401 U.S. 37, 43-44 (1971). See JMM Corp. v. Dist. of Columbia, 378 F.3d

---

[5] Plaintiff argues that Defendants' Motion should be denied because "the motion is procedurally defective, is miscaptioned, confuses the record, and fails to set forth the legal standard for the application of Fed. R. Civ. P. 12(b)(6). It does not address ten of the twelve claims of the Complaint and fails to address the merits of the remaining two, and it ignores the Plaintiff's requests for declaratory judgment, permanent injunction and other relief." Pl.'s Opp'n at 3. As Defendants correctly point out, "the basis for the Government's motion is plain: the Government has moved to dismiss the complaint in its entirety precisely because all of the counts of [Plaintiff's] complaint seek equitable relief, but none of them demonstrates the need for such relief, on either a preliminary or permanent basis, in light of the adequate remedy at law available to plaintiff to protect his rights." Def.s' Reply at 2.

1117, 1121 (D.C. Cir. 2004) (same); Blalock v. United States, 844 F.2d 1546, 1549 (11th Cir. 1988) (same). See also 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2942 ("historically, and even today, the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy").

In this case, as the Court previously pointed out, "if and when Plaintiff is indicted, he may challenge the constitutionality of any charges brought against him pursuant to Federal Rule of Criminal Procedure 12(b), which permits a defendant to raise by motion, after indictment but before trial, a defense based on 'defect[s] in instituting the prosecution.'" Miranda v. Ashcroft, et al., 04cv1578 (GK), October 1, 2004 Mem. Op. at 7, n.4 (quoting Fed. R. Crim. P. 12(b)(3)(a)). See Deaver v. Seymour, 822 F.2d 66, 70 (D.C. Cir. 1987) ("[b]y implication, the existence of [Fed. R. Civ. P.] 12(b)(1) suggests that appellant's constitutional challenge is not to be raised in a preindictment civil injunctive action"); North v. Walsh, 656 F.Supp. 414, 421 (D.D.C. 1987) (citing Fed. R. Crim. P. 12(b) and noting that the "criminal justice system is structured to provide the criminal defendant ample opportunity to vindicate his rights after he is indicted") (emphasis in original); Blalock, 844 F.2d at 1150 (motion to dismiss indictment affords "adequate legal remedy"). Plaintiff's Complaint should, therefore, be dismissed because Plaintiff has "an adequate remedy at law" in the form of a Rule 12(b) motion to dismiss his indictment.

Plaintiff argues that Rule 12(b) is not an adequate legal remedy because (1) his Complaint implicates the Speech and

Debate Clause; (2) his First Amendment rights have been chilled; and (3) Defendants are operating in bad faith. These arguments are unpersuasive.

First, Plaintiff contends that injunctive relief from prosecution is "mandated" in cases involving Speech and Debate immunity. See Pl.'s Opp'n at 3. As the Court previously pointed out, however, none of the cases cited by Plaintiff involve a federal court "'enjoin[ing] prosecutions based on Speech and Debate immunity and First Amendment grounds.'" Miranda v. Ashcroft, et al., 04cv1578 (GK), October 1, 2004 Mem. Op. at 7, n.5 (quoting Pl.'s Mot. for a Temporary Restraining Order at 1-2). Moreover, as Defendants correctly point out, "none supports the proposition that the Federal Rules of Criminal Procedure cannot adequately protect [Plaintiff's] rights, if any, under the Speech [and] Debate Clause." Def.s' Reply at 5.

Second, Plaintiff argues that he should be allowed to maintain the instant action because his First Amendment rights would otherwise be chilled. As the Court previously pointed out, however, "[t]he loss of First Amendment freedoms in this case took place, if at all, more than one year ago. 'A preliminary injunction will not remedy any impending harm to [P]laint[iff]'s First Amendment interests today for there is none.'" Miranda v. Ashcroft, et al., 04cv1578 (GK), November 15, 2004 Mem. Op. at 10 (quoting Veitch v. Danzig, 135 F. Supp.2d 32, 37 (D.D.C. 2001) (emphasis added)).

Third, although Plaintiff alleges that Defendants have acted in bad faith in pursuing an investigation of the matters referred to the Department of Justice by the Senate, he has

made no showing to support that conclusory allegation. As the Court previously pointed out, there are no allegations of harassment or repeated threats of prosecution. See Miranda v. Ashcroft, et al., 04cv1578 (GK), November 15, 2004 Mem. Op. at 8 (internal citations omitted). Indeed, as Defendants correctly point out, Plaintiff "proffers no facts about the defendants' alleged seizure of records that in any way supports his argument that the criminal investigation is being pursued in bad faith." Def.s' Reply at 8.

## IV. CONCLUSION

Accordingly, for the foregoing reasons, Defendants' Cross-Motion to Dismiss the Complaint is **granted**.

An Order will issue with this Memorandum Opinion.

February 23, 2005

GLADYS KESSLER
U.S. District Judge

## APPENDIX D - FEBRUARY 23, 2005 DISTRICT COURT ORDER

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MANUEL A. MIRANDA,

Plaintiff,

v. Civil Action No. 04-1578 (GK)

JOHN D. ASHCROFT, Attorney General of the United States, et al.,

Defendants.

**ORDER**

Plaintiff, Manuel A. Miranda, former Judicial Affairs Counsel to the Office of the Senate Majority Leader, brought suit against Defendants, John D. Ashcroft, then-Attorney General of the United States, and the Honorable W. Ralph Basham, Director of the United States Secret Service, seeking "a declaratory judgment that Plaintiff did not violate certain laws of the United States, namely Section[] 1030(a)(2)(B), Section 641, and Section 1001(c) of Title 18, that certain of these laws are unconstitutional, or unconstitutional as applied to the Plaintiff, or nonjusticiable, and that Plaintiff is immune from prosecution, or testimony under these laws pursuant to the Speech and Debate Clause." Compl. at ¶ 30.

This matter is now before the Court on Defendants' Cross-Motion to Dismiss the Complaint.[1] Upon consideration of the Cross-Motion, Opposition, Reply, and the entire record herein, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that Defendants' Cross-Motion to Dismiss the Complaint [**#11**] is **granted.**

February 23, 2005

GLADYS KESSLER
U.S. District Judge

[1] Defendants fashioned the instant Motion as a cross-motion to Plaintiff's motion for an expedited preliminary injunction, which the Court denied on November 15, 2004.